REPORT

of the

FORTY-FIRST ANNUAL MEETING

of the

MARYLAND STATE BAR ASSOCIATION

held at

THE HOTEL AMBASSADOR, ATLANTIC CITY, N. J.

JULY 2, 3 AND 4, 1936

Published by

MARYLAND STATE BAR ASSOCIATION

NINETEEN HUNDRED AND THIRTY-SIX

ADDRESS BY HON. DEAN G. ACHESON

ROGER BROOKE TANEY

Notes Upon Judicial Self-Restraint

Mark Antony is made to say by Shakespeare—

> "The evil that men do lives after them,
> The good is oft interred with their bones."

The same may be said of judicial mistakes. It is the irony of fate that for three-quarters of a century the accepted conception of Roger Brooke Taney has been based upon the occasion when, yielding to the temptation, always disastrous, to save the country, he put aside the judicial self-restraint which was his great contribution to the law and custom of the Constitution.

It is of this contribution that I wish to speak. For the giant stature which Taney assumes in the history of the Supreme Court is due chiefly to his insistence that the judge, in applying Constitutional limitations, must restrain himself and leave the maximum of freedom to those agencies of government whose actions he is called upon to weigh. And it is an appreciation of this view of the Constitutional judge's function of which we today stand in need.

When Taney came to the bench, John Marshall had already established the outlines of our federal system and the place of the Court in it. He had done so in sweeping abstractions, in tune with the lofty philosophical approach to governmental problems which was characteristic of his time. This very abstraction imparted strength to his assertions, and contributed greatly to their acceptance in a time when our government was comparatively unsettled and questions of power might turn upon the audacity of the claimant.

But Marshall's conceptions had not yet been put to the severe test of repeated, particularized application; the country had hardly passed the stage when generalizations, well nigh as broad as the Constitution itself, would suffice to dispose of immediate issues.

As far as they had gone, Marshall's conceptions did reflect, however, the dominant view of his generation that the area within which governmental action should be permitted to affect private rights was a sharply restricted one. Indeed, it was Jefferson and not Marshall who said that that government was best which governed least. Laissez-faire was not a party issue; the doctrine

had been settled by a curious combination of Adam Smith and the French Revolution. Of the principles laid down by Marshall, that which held the greatest immediate possibility for governmental restriction was contained in *Gibbons v. Ogden*.[1] For it was through the implied prohibition of the commerce clause that the State legislatures, which were for many generations to be the chief agencies for curbing property rights, might most sharply have been limited.

In any event, it was clear that with but little effort Marshall's decisions could have been turned into instruments for imposing upon the nation certain blunt and rigid conceptions of the rights of property, and, in the hands of a judge so inclined, the power assumed by Marshall might readily have been extended to the point where the Court would have been dictating the policy of legislation.

A further circumstance prevailing at the time of Taney's accession, when weighed against that just described, made the task of Chief Justice a most vital one. In 1828 Jackson came to power, on the crest of a movement which in the most technical sense was revolutionary. Marshall, Marshall's Court (the "Old Court" as Justice Story was nostalgically to call it), and the government of the nation theretofore had been the exclusive property of the upper classes. Between groups in those classes controversies had raged, sometimes bitterly, but, on the whole, there had been no sharp division of interest. However, with Jackson and Jacksonian Democracy there came times that made good people shudder. For not only was the White House trampled with the muddy boots of the vulgar,[2] but their voices suddenly became articulate, political office fell into their hands, and they boisterously, impudently asserted a new regime claiming all power for the common man.

The philosophy of this new movement is not clearly known to us because, perhaps, it had no real philosopher. It is not unreasonable to guess that Jackson himself was an honest old Jeffersonian, and that the agrarianism of John Taylor of Caroline suited him well.[3] But it is clear that the deep passion of the whole movement was centered upon the Bank. Monopoly has always been a rabble-rousing word in our politics. Indeed the one great decision of John Marshall which was truly popular was so not because of its elaboration of the commerce power, but be-

[1] 9 Wheaton 1 (1824).
[2] Bowers, Party Battles of the Jackson Period, p. 47.
[3] II Parrington, Main Currents in American Thought, pp. 145 ff.

cause it happened to strike down a monopoly.[4] And with Jacksonism there came a vituperative outburst against the Bank as the ultimate of monopolies through which, it was charged, the destiny of the masses was controlled by a corrupt coterie of financiers.

While there was nothing in Jacksonism that denied the essential thesis of laissez-faire—in fact Jackson's ideal was as anarchic as Jefferson's[5]—it did look to government as the means for breaking centralized power by the simple process of withdrawing governmental support, and the support especially of the national government. And so virile was the movement that there can be little doubt that if the full implications of, let us say, the philosophy that produced the *Dartmouth College* case had been carried out, there would inevitably have been a popular collusion with the Court that could have had but one event. In any case the sprawling, vociferous masses of Jacksonism were demanding that property rights, when they took the form of privilege, should not be untrammelled.

Another factor, giving point to the previous ones mentioned, entered the situation presented by Marshall's death, although it could scarcely have been appreciated at that time. The years which Taney was to serve witnessed the most profound technological and business changes in the life of the nation. The development of steam transportation—possibly the most important single episode in American history—took place; in 1834 the first through railroad between New York and Philadelphia was opened, and twenty years later the locomotive ran uninterrupted from the Atlantic to the Mississippi. The first ocean steamship came to these shores in 1838. Immigration exceeded 100,000 a year by 1842. Gold was discovered in California in 1848, and in the same year the first general business corporation laws were enacted in New York.[6] And, as though to cap the unruly period, in 1849 the Astor Place riot occurred, one of the first times that militia reduced a mob of demonstrators with bullets.[7] In short, during this era the country was being transformed from the comparatively simple agrarian community that had borne Marshall and Madison to the plunging, reckless, complex industrialism that was already well flowered by the time the land

[4] Gibbons v. Ogden, supra; see IV Beveridge, Life of John Marshall, pp. 445, 447.

[5] II Parrington, op. cit., p. 151.

[6] II Warren, The Supreme Court in United States History, pp. 408-410.

[7] Minnigerode, The Fabulous Forties, c. VII.

was splashed with blood in '61. Moreover, it was during this period that the legislatures began to concern themselves with social problems. The emancipation of married women, the recognition of labor unions, prison reform, these and other measures[8] were to reflect a broadening of legislative activities into realms and for ends that had been but slightly considered during the preceding decades.

In sum: With Taney's accession the broad juridical outlines of the federal system had been sketched in lofty terms of abstract principles. But the day of philosophers had set, and the great problem facing the Court was that of giving practical, particularized content to general conceptions. Straining at old ties, there was on the political scene a new force with new values, which in its boisterous vigor demanded a reorientation in government. At the same time economic processes were to undergo far-reaching changes that made over the continent, creating unfamiliar business interests and forms, and foretelling a scope of industrial development that could not have been dreamed of in 1789. And new legislative activity developed, to herald a day when laws would trench upon the most intimate concerns of everyday life.

To a considerable extent Taney assumed his position well equipped to meet the challenge. Not all Democrats were uncouth and untrained, despite the gossip of the drawing room. When Jefferson Davis met the young lady who was to become his wife, she exclaimed, "Would you believe it, he is refined and cultivated, and yet he is a Democrat!"[9] And Taney, although a Democrat, had been one of the leaders of the talented Maryland Bar. Neither Robert Harper nor William Wirt had stood above him,[10] and when he was first proposed for the Supreme Court, before Marshall's death, the great Chief Justice indicated favor for the appointment.[11] There is no reason for surprise that his views were to be set forth with a compelling force and lawyer-like technique that hold the highest place in the Reports.

Of as much importance was Taney's understanding of, and sympathy with, the aspirations of the new political forces. Indeed he had been one of Jackson's chief lieutenants and had served his party with courage and fidelity. In his resolute discharge of Jackson's program he is said to have been fully con-

[8] II Warren, op. cit., p. 309.
[9] II Parrington, op. cit., p. 146.
[10] II Warren, op. cit., p. 154.
[11] Idem, p. 260; Bowers, op. cit., p. 440.

scious that he risked his hopes for a place on the Supreme Bench.[12] In the truest sense his was a political appointment. When his name was first presented for a place on the Court, the President was overridden by the Senate, and confirmation of his second appointment was held up by a bitter fight. That the fight was against Jacksonism[13] was quite proper, for there was no more staunch Jacksonian.

Contrary to the dominant trend of thought theretofore, Taney was not exclusively preoccupied with the guarantee of property rights. "While the rights of private property are sacredly guarded," he said, "we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[14] The concentration of power, the "money power" he called it, was an attempt "to destroy the spirit of freedom and manly independence in the working classes of society."[15] The granting of governmental privileges should always be made upon an exclusive consideration of the interests of the community. Shortly after his confirmation as Chief Justice he wrote to President Jackson:

> "The consideration upon which alone, such peculiar privileges [corporate charters] can be granted is the expectation and prospect of promoting thereby some public interest, and it follows from these principles that in every case where it is proposed to grant or renew a charter the interests or wishes of the individuals who desire to be incorporated, ought not to influence the decision of the government. The only inquiry which the constituted authorities can properly make on such an application, is whether the charter applied for, is likely to produce any real benefit to the community, and whether that benefit is sufficient to justify the grant."[16]

This is not to say that Taney was radical, in the modern sense, in regard to the rights of property. He wrote the opinion in *Bronson* v. *Kinzie*.[17] But plainly he understood the aspirations that were stirring humble men, he suspected the accumulation of economic power in a few hands, and he accepted as an entirely proper function of government the restraining of privilege.

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12 Kendall, Autobiography, p. 386, cited in Bowers, op. cit., p. 306.
13 II Warren, op cit., pp. 284 ff.
14 Charles River Bridge v. Warren Bridge, 11 Peters 420, 548 (1837).
15 II Warren, op. cit., pp. 310-311, quoting Taney to Jackson of Sept. 12, 1838.
16 Swisher, "Roger B. Taney," p. 367.
17 1 Howard 311 (1843).

However a superb legal capacity and good intentions do not suffice to explain the peculiar and permanent contribution made by Taney to our Constitutional history. The task facing the Court in 1835 was that of making workable the juridical scheme that Marshall had formulated. The diverse economic interests that were rapidly developing, the new voices that were demanding attention on the political scene, the broad acceleration of national life—all challenged the efficacy of Constitutional government, and demanded judicial statesmanship of a high order. Taney met the test. His decisions were to elaborate in many fields a restraint and caution that served at once to modify the lines so audaciously drawn by the "Old Court" and to leave to the more elastic realm of legislative discretion the determination of much that judges before him might have arrogated to themselves as the Constitutional Guard.

It cannot be said that the new Chief Justice advanced upon decision with any articulate political theory. He applied no touchstone of doctrine to settle questions as they *should* be settled. Rather, it was his method of approach, his respect both for the opinions of other branches of government and for the possible opinions of future generations, his technique of leaving the maximum of freedom within the Constitutional imperatives which, although only partially accepted by his brethren, imparted the degree of adjustability to our Constitutional structure that has preserved it until today. The recovery of his method and spirit still offers the most happy solution of the controversy which now threatens to center about the Court.

The function of formulating the great questions of policy involved in delimiting the respective spheres of the national and state governments was not, in his view, exclusively confided to the judges. His method of approach was to leave this making of policy, so far as possible, to the trial of experience and legislative judgment, reserving judicial intervention until "the angry and irritating controversies between sovereignties," [18] arising from conflicts in legislation or executive or judicial action, called for the final arbitrament provided by the Constitution. Every opportunity, he thought, should be given to solving these problems elsewhere than in the court room. "In taking jurisdiction as the law now stands," he said in his dissent in the *Wheeling Bridge* case, "we must exercise a broad and undefinable discretion, without any certain and safe rule to guide us . . . . such a dis-

[18] **Ableman v. Booth, 21 Howard 506, 521 (1859).**

cretion appears to me much more appropriately to belong to the Legislature than to the Judiciary." [19]

This attitude was not founded in any doubt of the supremacy of the national government or the right and necessity of judicial review, or in narrow provincialism, or in tenderness for the "peculiar institution" of the South; but, rather, in the intuition of the gifted ruler as to the nature and delicacy of the power he exercised.

Taney's judicial self-restraint is most familiar in his treatment of the Commerce Clause. In his opinion in the *License Cases,* he said:

> ". . . . the mere grant of power to the general government cannot, upon any just principles of construction, be construed to be an absolute prohibition to the exercise of any power over the same subject by the States. The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress. Yet, in my judgment, the State may nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbours, and for its own territory; and such regulations are valid unless they come in conflict with a law of Congress.
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> ". . . . And when the validity of a State law making regulations of commerce is drawn into question in a judicial tribunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the State from pestilence and disease, or to make regulations of commerce for the interests and convenience of trade.
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> "Upon this question the object and motive of the State are of no importance, and cannot influence the decision. It is a question of power." [20]

This view of the commerce clause contemplates a sharing of the power to determine the high question of policy whether in any situation local regulation is satisfactory or whether there is

[19] 13 Howard 518, 587 (1852).
[20] 5 Howard 504, 579, 583 (1847).

need for a uniform rule, or a different rule or no rule. Under the Taney doctrine, if Congress is satisfied to leave a matter to the States, that is an end of it. He would permit the evolution of constitutional practice by actual experience, leaving decisions in the first instance to legislatures, rather than to the *a priori* reasoning of judges. The Court would be called upon to set aside a State law only when it came into actual conflict with a law of Congress.

The case in which Taney spoke involved a regulation by a State of the sale of liquor as applied to an interstate shipment. The particular regulation was sustained, but when the question whether a State might prevent shipments of liquor into its territory was presented to the Court much later the power was denied.[21] Then followed thirty years of agitation for national prohibition, the tardy attempts to repair the Court's misjudgment by the Webb-Kenyon Act[22] and the Reed Amendment,[23] and finally the Eighteenth Amendment. It is not unreasonable to believe that an acceptance of the Taney view would have spared us this whole painful and costly episode.

But the Court refused to follow Taney. Instead, it developed the now accepted rule that when the subject of regulation requires a uniform rule the federal government alone may legislate; in other fields the States may legislate until Congress acts; and in still others both governments may act. But the question in which class any particular subject matter belongs has been reserved exclusively for the decision of the judges.

The same attitude of self restraint is shown in Taney's treatment of the right of a foreign corporation to do business.[24] Mr. Justice McKinley had held on circuit that a corporation had no existence, and could not even contract, outside the State of its creation. Webster urged upon the Court the view that corporations had a constitutional right to go into any State which local government could not deny. Here, too, Taney refused to arrogate to the Court the ultimate decision of policy. Instead he held that a rule of comity would permit a corporation, in the absence of clear prohibition by a State, to do business through its agents within the State. The power to decide whether it should be excluded, or the conditions of its admission, he left to the State.

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[21] Leisy v. Hardin, 135 U. S. 100 (1890).

[22] Act of March 1, 1913, c. 90, 37 Stat. 699. See Clark Distilling Co. v. Western Maryland Railway Company, 242 U. S. 311.

[23] Act of March 3, 1917, c. 162, Sec. 5, 39 Stat. 1069.

[24] Bank of Augusta v. Earle, 13 Peters 519 (1839).

His successors, less willing to forego judicial policy making, have narrowed the scope of this decision by superimposing the doctrine of unconstitutional conditions to the right to do business.[25]

In the *Charles River Bridge* case[26] Taney was urged with all the eloquence of Webster to hold that privileges granted by government should carry with them all the immunities from subsequent state action which would be necessary to preserve to them the full measure of their pristine strength. The argument was appealing and the weight of Story's learning and prestige was thrown to Webster's side. But the Chief Justice refused to assume the power of prescribing the rights which a legislature ought to respect. He insisted that the courts could enforce no greater rights than had been unmistakably and definitely granted and that, where there was any ambiguity, the question should be left entirely to the discretion of the legislature. Thus a franchise to operate a bridge did not perforce carry with it immunity from future destructive competition. His reasoning in deciding that charters could not by one iota be enlarged by implication is most revealing: he could not presume the surrender of power by a sovereign State; any such view would restrain the future development of the country; and the judiciary would be plunged into a process of detailed definition and regulation of an essentially legislative character. And basic to his thought was the preservation of the essential functions of government. He wrote:

> "The continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform, transferred to the hands of privileged corporations."[27]

Again, Taney's sound intuition led him to refuse for the Court the power to determine when one State should deliver to another a fugitive from justice and to force extradition. He was willing to leave to the Governors of the State the execution of their duty under the Constitution. That they might be derelict in their duty was not a reason for the Court assuming it.

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[25] Compare, for instance, Doyle v. Continental Insurance Company, 94 U. S. 535 (1876), and Security Mutual Life Insurance Company v. Prewitt, 202 U. S. 246 (1906) with Terral v. Burke Construction Company, 257 U. S. 529 (1922). See Hale, Unconstitutional Conditions and Constitutional Rights, 35 Col. L. Rev. 321 (1935).

[26] 11 Peters 419 (1837).

[27] Id. at p. 548.

> " . . . when the Constitution was framed . . . [he wrote] it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision by the Executive of every State. . . .
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> "But if the Governor of Ohio refuses to discharge this duty there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him." [28]

In one of its applications, however, the Court has fully accepted the Taney restraint. *Luther* v. *Borden* [29] arose out of the disturbance of Dorr's rebellion in Rhode Island, an attempt to establish a new constitution and government in that State. The plaintiff, a partisan of the new government party, had been arrested in his house by military officers of the old government, and brought trespass. He claimed that the officers had no authority since the new government had been established by a majority of the people and should be protected by the Constitutional guarantee of a republican form of government. Taney refused to go into the question of the legal authority of the government actually in power, declaring that the questions involved were political and beyond the sphere of the Court. The wisdom and authority of his restraint have never been doubted.[30] Its significance has not been fully appreciated.

For the intuition which leads judges to decline to decide what they call a political question, even though it is as much bound up with the legal issue before them as many other questions which they do decide and which laymen call political or economic, is a sound caution in approaching the founts of sovereignty. When in the latter half of the fifteenth century the Duke of York laid formal claim to the crown, demanding an answer from the lords spiritual and temporal assembled in Parliament, the lords sent for the King's justices to have their advice and counsel to find all such objections as might be laid against the claim. To which the Justices, afer taking what we may be sure was the most earnest thought, replied that

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[28] Kentucky v. Dennison, 24 Howard 66, 109 (1860).

[29] 7 Howard 1 (1849).

[30] Compare Georgia v. Stanton, 6 Wallace 50 (1867); Taylor and Marshall v. Beckham, 178 U. S. 548 (1900); Pacific States Telephone & Telegraph Company v. Oregon, 223 U. S. 118 (1912).

> ". . . . sith this mater was betwene the Kyng and the seid Duc of York as two parties, and also it hath not be accustumed to calle the Justices to Counseill in such maters, and in especiall the mater was so high, and touched the Kyngs high estate and regalie, which is above the lawe and passed ther lernying, wherefore they durst not enter into eny communication thereof, for it perteyned to the Lordes of the Kyngs blode, and th' apparage of this his lond, to have communication and medle in such maters; and therefore they humble bysought all the Lordes, to have theym utterly excused of eny avyce or Counseill, by theym to be yeven in that matier. . . ." [31]

In the fifteenth century judges who intermeddled, even upon invitation, at the very source of sovereign power might lose their heads. In the twentieth the stake is the institution of judicial review.

We have already suggested that the views of Taney are, a century later, of more than historical interest. The Court is again, as it was in his time, the center of political controversy. In both parties, as the result of recent decisions, there is talk of amending the Constitution. Some go so far as to urge a limitation upon the powers of the Court. None of these suggestions has yet been made specific. As soon as this is attempted, the difficulties will appear. Amendments designed to achieve specific purposes will be seen to effect changes far greater than anyone desires and will merely substitute new problems and uncertainties for existing ones.

The present difficulties come from judicial policy-making not necessitated by the simple language of the Constitution, but drawn from judgments and intuitions of the judges. The remedy is not to continue an unwise practice and attempt to counteract it through the dangerous and cumbersome method of amendment, but to change the practice. And the change must be by the Court itself in the attitude with which it approaches judgment upon the validity of laws. Again we turn to Taney for authority that

[31] Wambaugh, Cases on Constitutional Law, Vol. I, p. 3. Similar intuitive caution may have prompted Chief Justice Jay to decline for the Court President Washington's request for advisory opinions. (Sparks, Writings of George Washington, Vol. X (1836) append. XVIII) and may have contributed to the decision of such cases as Muskrat v. United States, 219 U. S. 346; Frothingham v. Mellon, 262 U. S. 447; and New Jersey v. Sargent, 269 U. S. 328. See Finkelstein, Judicial Self Limitation, 37 Harv. L. Rev. 338; 39 Id. 221.

the practice of the Court may be subjected to critical examination without conviction of heresy. "If the judgment pronounced by the court," he wrote, "be conclusive it does not follow that the reasoning or principles which it announces in coming to its conclusions are equally binding and obligatory." [32]

In Taney's day the pressure of regulation came from the States. Today because of changed conditions the same pressure finds its outlet in Congressional enactments. The Congress is quite frankly using its granted power to achieve collateral results. These attempts bring a divided response from the Court. One point of view is that the Court must examine into ultimate purposes. If it finds that Congress seeks by indirection to achieve ends which judges for *a priori* reasons of federal symmetry think or have thought should be controlled solely by the States, the Court must strike down the law, whether or not State control is possible or desired. If the country does not like this, it is said, it may change the Constitution.

The inheritors of Taney's tradition may well take a different view. They may say that the answer to all these questions is not in the simple words of the Constitution. To them it is of preeminent importance that judges should use the utmost restraint in making policy. To them it is enough—passing for a moment the due process clauses—that Congress is seeking whatever end it may be through the medium of its granted powers. They may say with Taney, "The object and motive . . . are of no importance, and cannot influence the decision. It is a question of power." [33]

True, if a conflict occurs between such a federal law and state policy however expressed, the Court must resolve it to prevent "the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force." [34] But one may feel a certain unreality in striking down a Congressional exercise of a granted power, in the absence of any conflict with state policy, on the ground that in purpose and effect it invades a field reserved to the States. Judicial restraint might well lead the Court to hold its hand until an actual conflict occurs. In such a case the country would be a unit in accepting the judgment of the Court which law should prevail to preserve the federal system.

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[32] Quoted by Swisher, op. cit., p. 157.
[33] 5 Howard 583 (1847).
[34] 21 Howard 521 (1859).

The view that Congress will usurp the functions of local government without constant discipline by the Court, subjects the institution of judicial review to too great a strain by exposing it too frequently to the dangers from which the King's justices respectfully asked to be excused. Some encroachment there may be upon the "fearful symmetry" of the federal system which the "immortal hand" of Marshall framed in his basement court room. Some things may be done which appear unwise even in the long view. But no choice is possible which includes all good and avoids all harm. The choice of restraint, which entails sharing with Congress and the State legislatures the task of evolving a custom and practice, as well as a law, of the Constitution, not only assures that the path may be lighted by experience as well as logic but gives more promise than any other that the powers of the Court will survive for use when they are needed.

In the field of the due process clauses of the Fifth and Fourteenth Amendments there is equal need for judicial self-restraint. In cases of this sort the Court is asked to set aside national and State laws for reasons which in most instances defy statement convincing to the man in the street. The Court has shown a tendency to make this vague phrase—due process of law—a congeries of specific concepts drawn from the beliefs and ideology of some of the judges. Such a limitation upon a democracy, as militant as it was in Taney's day, cannot be reasonably expected to endure. And little is gained by the interpretation that the clause prohibits what a majority of the judges find to be arbitrary or unreasonable. Anything with which we strongly disagree seems unreasonable and arbitrary.

Again, what is needed is not a rule but a method of approach. The due process clause conceived as a method of sober appeal to better judgment has a real function and utility. But the appeal must be successful. If it fails, it is worse than useless, as the last attempt testifies.[35] Justice Holmes used to tell a story of going, as a young man, to Emerson with an essay he had written on Plato. After reading it, Emerson's only comment was, "my boy, when you strike at a king, you must kill him."

If the Court strikes at a law with the due process clause it must kill it. It must be able to convince the great majority of press and people by compelling analysis in terms generally accepted that

[35] Morehead v. Tipoldo, 80 L. Ed. 921, decided June 1, 1936; see Mr. Landon's telegram of June 11, 1936, to the Republican Convention, New York Times, June 12, 1936, p. 1; Democratic Platform, 1936, "The Constitution."

the law was arbitrary. If judges cannot convince their brethren, they might well ponder the implications of their failure. Judges, as Justice Holmes has said, "need something of Mephistopheles." They "too need education in the obvious." [36]

Taney's great service was to teach the lesson of self-restraint. His task came to an end in a setting of unequalled tragedy. Appomatax was casting its inevitable shadow over fields drenched in blood. His son-in-law was with the forces of the Confederacy. Old, lonely, broken in body and spirit, he was hated and vilified by men whose passions were fanned by war and whose pens were dipped in gall. He died in October, 1864. Of official Washington only the President and two members of the Cabinet would attend the brief service held there. When his body was brought back to rest in his native State his spirit might well have said in the words of Wolsey:

> "An old man, broken with the storms of state,
> Is come to lay his weary bones among ye.
> Give him a little earth for charity."

His Maryland has given him a little earth, and not in charity but honor. Indeed, he sits today before the old State House, first in Maryland's affection, his brooding figure the cynosure of awe and veneration. Beyond his homeland, prejudice and calumny have beat upon him with a blind relentlessness scarce equalled in our history. Yet, in the musty pages of the Reports, his teachings have been preserved and today those who anxiously defend our Constitutional order will do well to scan with care the records of his thought. For they disclose that high humility without which judicial power must ultimately fail.

MR. LAUCHHEIMER: Mr. President, I move that the thanks of the Association be tendered Mr. Acheson for his very interesting address.

The above motion was duly seconded, and having been put to a vote, was declared carried.

THE PRESIDENT: The thanks of the Association are due and are extended to Mr. Acheson. Now, gentlemen, what is the pleasure of the Association? As you will have noted, we have transacted absolutely none of our routine business. We can now either remain in extended session and finish up our routine business, which would consume about an hour, I take it, or we might

[36] Collected Legal Papers, p. 295.

call upon Mr. Hisky to make a recess motion until about three o'clock this afternoon and then finish our work. What is your pleasure?

MR. LAUCHHEIMER: I think that we should continue in session, Mr. President. We would have great difficulty, in my opinion, should we recess to meet again this afternoon. What we have before us will not take us very long, I am sure.

THE PRESIDENT: Well, if that is the pleasure of the Meeting we will proceed.

MR. CHAPMAN: Mr. President, inasmuch as we have been thinking about Chief Justice Taney, I should like to announce that Mr. Delaplaine has brought down here some pictures of the home life of the Chief Justice, and also a number of his letters, some being those which he received and some being those which he addressed to others. They are left in Mr. Delaplaine's possession because they are priceless, but at the same time, he wishes me to announce to the membership that they are open to the inspection of all those who are interested. They will be exhibited here just immediately following the meeting this morning.

THE PRESIDENT: Now, the next in the order of business this morning is the unfinished business.

MR. CHAPMAN: Mr. President, we have here the Report of the Auditing Committee stating that they have examined the records of the Treasurer. Mr. Requardt is now in the room, I believe, and has that report.

THE PRESIDENT: Yes, sir. Mr. Requardt, as Chairman of that Committee, and as a well-known auditor and Master, are you ready to make the report?

MR. JOHN M. REQUARDT: We have found everything in fine shape, Mr. President. We have the report here.

THE PRESIDENT: We trust the report is as accurate as it is informal.